No. 3722

United States
Circuit Court of Appeals
For the Ninth Circuit

E. VACHINA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE
Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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STATEMENT OF THE CASE

I.

The above named plaintiff in error, E. VACHINA, on the 28th day of December, 1920, and thereafter, was conducting a soft drink establishment, in the rear of which was a dining room and

kitchen, where, at the time he was serving meals for himself and several boarders.

On the 28th of December, 1920, P. Nash, one of the Prohibition Enforcement Officers for the State and District of Nevada, went before Anna M. Warren, one of the United States Commissioners for the District of Nevada, for the purpose of securing a search warrant to search the premises and property of the said E. Vachina at No. 116 N. Center Street, in the City of Reno, Washoe County, State of Nevada, formerly known as the "Alpine Winery", and on said 28th day of December, 1920 made and filed the following affidavit. Transcript of Record upon Writ of Error page 3, also page 22:

"UNITED STATES OF AMERICA,
DISTRICT OF NEVADA,
COUNTY OF WASHOE. } ss.

Affidavit

"On this 28th day of December, A. D. 1920, before me, Anna M. Warren, a United States Commissioner for the District of Nevada, personally appeared P. Nash, who being first duly sworn deposes and says:

"That he is and at all times herein mentioned was a Federal Prohibition Enforcement Agent in and for the District of Nevada and as such makes this affidavit and presents the facts, circumstances and conditions hereinafter set forth that heretofore came to the knowledge of and were ascertained by affiant for the purpose of having

issued hereon and hereunder a search-warrant, under and pursuant to the provisions of Title II of the National Prohibition Act, respecting the issuance of search-warrants, to search the following described premises, to-wit: The Alpine Winery together with all rear rooms, basements, and attic, cupboards, and every portion of said soft drink establishment situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, Vachina Brothers proprietors; that affiant has knowledge and information that in and upon the aforesaid premises, and since Title II of the said National Prohibition Act went into effect, to-wit: after the first day of February, A. D. 1920, intoxicating liquor containing one-half of one percentum of alcohol, or more, by volume was and now is being manufactured, sold, kept, or bartered, for and fit for beverage purposes, in violation of Title II of the said National Prohibition Act and particularly of Section 21 of said Title II.

"That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers absolutely credible and reliable, but whose name cannot be stated on this affidavit, that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath.

"That it will be necessary to search the above mentioned premises in order to secure the said intoxicating liquor and apparatus for the manu-

facture of same for the United States Government and that it will be impossible to secure the aforesaid intoxicating liquor and apparatus for the manufacture of same without the aid and use of a search-warrant.

"WHEREFORE affiant prays that a warrant to enter the above-mentioned premises and there to search for the said intoxicating liquor and apparatus for the manufacture of same be issued pursuant to the statutes in such case made and provided.

"(Signed) P. NASH.

"Subscribed and sworn to before me this 28th day of December, 1920.

(SEAL) ANNA M. WARREN,
United States Commissioner."

After the filing of the foregoing affidavit the said Commissioner, Anna M. Warren, issued to the said P. Nash, a search-warrant to search the said premises, which search-warrant is as follows. Transcript of Record upon Writ of Error, page 25:

"The President of the United States of America,
To the United States Supervising Prohibition Enforcement Agent, His Deputies, or Any or Either of Them: Greetings:

"WHEREAS, P. NASH has heretofore, to-wit: on the 28th day of December, 1920, filed with me, Anna M. Warren, a United States Commissioner in and for the District of Nevada, at Reno, Nevada, his affidavit, in which he states that he is

a Federal Prohibition Enforcement Agent acting under the United States Supervising Agent at San Francisco, California; that in and upon those certain premises situated at 116 North Center Street, in the City of Reno, County of Washoe, State of Nevada, known as the Alpine Winery, together with all rear rooms, basements and attics, cupboards, and every portion of said soft drink establishment; proprietors of said Alpine Winery being Vachina Brothers; that affiant has knowledge and information that there is located and concealed, stored and kept, sold, possessed and bartered and fit for beverage purposes, in violation of Title II of said National Prohibition Act and particularly in violation of Section 21 of said Title II thereof intoxicating liquor containing one-half of one percentum or more of alcohol by volume;

"That it will be impossible for the United States Government to obtain possession of said intoxicating liquor without a search-warrant to enable the search to be made of the premises hereinabove described, whereupon affiant prays that a search-warrant issue.

"NOW, THEREFORE, pursuant to Section 25, Title II of the Act of October 28, 1919, known as the National Prohibition Act you are hereby authorized and empowered to enter said premises hereinabove described, in the daytime or in the night-time, and thoroughly to search each and every part of said premises for the said intoxicating liquor concealed in violation of the Act of October 28, 1919, and to seize the same and take it into your possession to the end that the same may be dealt with according to law and hereof to make due return with a written inventory of the property seized by you or any or

either of you without delay.

"WITNESS my hand this 28th day of December, 1920.

ANNA M. WARREN
U. S. Commissioner in and for the District of Nevada."

"(Endorsed)

Reno, Nevada, De. 30th, '20.

"Make return on within warrant as follows:
"Searched premises described within on Dec. 29th, 7 P. M., 1920.
"Seized as evidence one qt. bottle containing j. a. brandy from back room, and one gal. d. j. containing wine.
"Arrested proprietor, A. Vachina.
"I, P. Nash, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all property taken by me on the warrant."

P. NASH,
Fed. Pro. Agt.

Thereafter, and on the 30th day of December, 1920 the said P. Nash, Prohibition Enforcement officer, accompanied by H. P. Brown, another Prohibition Enforcement officer, went to the premises described, and proceeded back into the kitchen where they found the plaintiff in error, E. Vachina; searched the premises and seized one quart bottle containing what is commonly called "jack-ass

brandy" and one gallon demijohn containing wine, as noted on the return of the search warrant. The plaintiff in error was arrested, taken before the United States Commissioner, and charged with unlawfully having liquor in his possession.

On the 6th day of January, 1921, a Motion to Quash the search-warrant was made before the Commissioner, Anna M. Warren. Transcript of Record upon Writ of Error, page 16:

> "Comes now the defendant above named and moves the Court to quash, set aside and hold for naught the search-warrant issued out of the above-entitled court on the 28th day of December, 1920, against the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY," said premises being occupied by the above-named defendant, on the grounds and for the reasons that no sufficient affidavit and no sufficient deposition or depositions were filed or taken by the said Commissioner before the issuance of said search-warrant showing probable cause for the issuance thereof.
>
> "Dated this 6th day of January, 1921.
>
> MOORE & McINTOSH,
> Attorneys for the Above-named Defendant."

And a notice of the said Motion served upon William Woodburn, United States District Attorney for the District of Nevada. Transcript of Record upon Writ of Error, page 15:

"To the Above-named Plaintiff, and WILLIAM

WOODBURN, U. S. District Attorney for the District of Nevada:

"You, and each of you, will please take notice that on Friday, the 7th day of January, 1921, at the hour of 2 o'clock P. M., or as soon thereafter as counsel can be heard, that the above-named defendant will move the Commissioner, Anna M. Warren, at her office in the Washoe County Bank Building in the City of Reno, Washoe County, Nevada, to quash, set aside and hold for naught the search-warrant issued by the said Anna M. Warren, as United States Commissioner in and for the District of Nevada, on the 28th day of December, A. D. 1920. That said motion will be made upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said Commissioner showing probable cause of any offence sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion the affidavit of P. Nash, made and filed before the said Anna M. Warren, Commissioner, aforesaid, on the 28th day of December, 1920, upon which said search-warrant was issued; also, the oral testimony of the said P. Nash, and all of the files of said cause in said Commissioner's court.

"Dated this 6th day of January, 1921.

MOORE & McINTOSH
Attorneys for the Above-named Defendant."

The Motion to Quash was presented and argued before the Commissioner and was, by the Commissioner, denied, and a full copy of proceedings certified up to the United States District Court for the District of Nevada.

Thereafter, at the February term of the United States District Court for the District of Nevada, an indictment was returned by the Grand Jury charging the plaintiff in error, E. Vachina, with unlawfully having intoxicating liquor in his possession contrary to Section III, Title II, of the National Prohibition Act.

Thereafter, and before trial, a motion was filed in the said District Court renewing the Motion to Quash made before the Commissioner. Transcript of Record upon Writ of Error, page 18:

> "Comes now the defendant above named, and renews his motion to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled court, on the 28th day of December, A. D. 1920, said motion having been made in said Commissioner's Court, and heard on the 8th day of January, A. D. 1921, by the said Anna M. Warren, Commissioner aforesaid.
>
> "Dated this 19th day of April, 1921.
>
> MOORE & McINTOSH
> Attorneys for Defendant."

Which motion was denied by the Court and exceptions taken and allowed.

The plaintiff in error also filed in said cause, in the United States District Court an original Motion to Quash the indictment and to return the property seized thereunder. Transcript of Record upon Writ of Error, page 20:

"Comes now the defendant above named, and moves the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, one of the Commissioners of the above-entitled Court, on the 28th day of December, A. D. 1920, said search-warrant directing a search of the premises at No. 116 North Center Street, in the City of Reno, Washoe County, Nevada, known as the "ALPINE WINERY", and occupied by the above-named defendant, and moves the Court, further, to direct the return of one bottle of jackass brandy, and one wicker covered demi-john or bottle containing wine, claimed to have been seized in said premises and taken therefrom by one P. Nash, and is now in the possession of William Woodburn, United States District Attorney, which the said William Woodburn, United States District Attorney, intends to use at the trial of this defendant in an indictment now pending against him in this court, said motion being based upon the grounds that the affidavit made and filed in said cause for the issuance of said search-warrant was insufficient, and did not allege facts sufficient from which the Commissioner or magistrate could find or determine that probable cause existed that any offense was being committed in said premises or by said defendant; that said affidavit is based purely on hearsay; that no sworn deposition was made or filed before said Commissioner showing probable cause of any offense sufficient to warrant the issuance of said search-warrant, and that there were not sufficient allegation of facts or circumstances in said affidavit to warrant or justify the Commissioner in issuing a search-warrant for said premises. That said search-warrant was in violation of the defendant's constitutional rights as guaranteed to him under and by virtue of the 4th Amendment to the Constitution of the United

States and that said search and seizure of said goods alleged by the said officers to have been taken therefrom is and will be in violation of defendant's constitutional rights guaranteed to him under the 4th Amendment to the Constitution of the United States and under the 5th Amendment to the Constitution of the United States.

"Dated this 19th day of April, 1921."

MOORE & McINTOSH
Attorneys for Defendant."

Also filing therewith and serving upon William Woodburn, United States District Attorney for the District of Nevada, a copy of the Motion to Quash and notice of Motion to Quash. Transcript of Record upon Writ of Error, page 19:

"To the Above-named Plaintiff, and WILLIAM WOODBURN, U. S. District Attorney for the District of Nevada:

"You, and each of you, will please take notice that on Tuesday, the 25th day of April, A. D. 1921, at the hour of 10 o'clock, or as soon thereafter as counsel can be heard, at the United States Federal Post Office Building, in Carson City, Nev., in the courtroom of the said above-entitled District Court, in said building, and before the Honorable E. S. Farrington, Judge of said District Court, the above-named defendant will move the Court to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December, 1920. That said motion will be made

and based upon the grounds that there was no sufficient affidavit or deposition made, taken or filed with or before said commissioner, showing probable cause or any offense sufficient to warrant the issuance of said search-warrant. That there will be used upon the hearing of said motion, the files, records and all proceedings had and taken before the said Commissioner, and forwarded by said Commissioner to the Clerk of the said United States District Court; and the oral testimony of P. Nash and H. P. Brown, and of the said William Woodburn, United States District Attorney aforesaid, and the files in said cause now in the office of the said Clerk of the District Court. That at the said time and place, and upon the grounds and for the reason hereinbefore set forth, and all of them, the defendant will move the Court for the return of all property to the defendant and to the premises, seized by the said P. Nash and his associates from the said premises under the said search-warrant, and for the further reason that the seizure and removal of said property was in violation of defendant's constitutional rights under and by virtue of the 4th Amendment to the Constitution of the United States.

"Dated this 19th day of April, 1921.

MOORE & McINTOSH
Attorneys for Defendant."

This motion came on to be heard and argued before the Court and was by the Court denied on the 3d day of May, 1921. Transcript of Record upon Writ of Error, page 30:

"Ordered that the petition for the return of certain seized property and the motion to quash

the search-warrant be, and the same are hereby, denied. To which ruling Mr. M. B. Moore, attorney for defendant, asks and is granted the benefit of an exception."

On May 7th, 1921, said cause coming on for trial before a jury, after the jury was sworn and before the taking of any testimony, objection was made by M. B. Moore, Attorney for the plaintiff in error, to the introduction of any testimony in said cause. Transcript of Record upon Writ of Error, page 58:

"Mr. MOORE: If the Court please, I object to the introduction of any testimony in this case which goes to what the officers found and what they did under a certain search-warrant issued out of the Commissioner's court, which is a part of the files and records in this case, on the 28th day of December, 1920, and anything that they did or saw in the premises described in that search-warrant, or any testimony as to what was seized, if anything, there by the officer serving the same, on the grounds that the search-warrant was insufficient and void, for the reason that no proper and sufficient affidavit had been made or filed before the Commissioner, nor was any other sufficient testimony taken to warrant the issuance of the search-warrant under which the officers operated, or to show that probable cause existed that there was an offense being committed there in violation of the Prohibition Act, or any other law of the United States; or that this defendant had or was committing any offense, on the grounds that the search and seizure was in violation of his constitutional rights, as provided under the Fourth Amendment to the Constitution of the United States; and that the use

and introduction of any testimony so secured would be in violation of his constitutional right, as provided in the Fifth Amendment of the Constitution of the United States; basing the objection on the proceedings heretofore had, and the files in this case.

"The COURT: The objection will be overruled.

"Mr. MOORE: Give us the benefit of an exception.

"The COURT: The exception will be noted."

During the examination of the witness, H. P. Brown, for the Government, objection was made to the following question. Transcript of Record upon Writ of Error, page 60:

"Q. What, if anything, did you find, Mr. Brown?

"Mr. MOORE: I object to what this witness may have found, or what he saw, or what he did, in these premises at that time, basing my objection on the general grounds laid down in my first objection to the introduction of any testimony.

"The COURT: It will be the same ruling, and you may have the same exception."

Also to the admission in evidence of the bottle and demijohn and their contents. Transcript of Record upon Writ of Error, page 63:

"Mr. DISKIN: We offer in evidence the bottle and its contents and the demijohn and its contents.

"Mr. MOORE: We object, if the Court please, on the grounds heretofore stated.

"The COURT: It will be the same ruling and same exception."

During the course of the examination of the witness for the Government, P. Nash, objection was made to a question propounded. Transcript of Record upon Writ of Error, page 67:

"Q. What was the defendant doing—you mean Vachina?

"Mr. MOORE: I object to any testimony as to what the defendant was doing, or what this witness saw or did at that time, basing my objection on the grounds heretofore stated.

"The COURT: Same ruling and exception."

At the close of the testimony of the witness, P. Nash, a motion was made to strike from the record the testimony of both the witnesses, H. P. Brown and P. Nash. Transcript of Record upon Writ of Error, page 73:

"Mr. MOORE: Now, if the Court please, I move the Court to strike from the record the testimony of Mr. Nash and of Mr. Brown relative to what they did on the evening as detailed by them; also all evidence as to what they found on that evening in the premises described by them, for the reason and on the grounds that it now appears from their testimony and the records of this Court, that they were operating under a search-warrant which was invalid, it having been issued upon an affidavit, which affidavit was insufficient, and that their actions thereunder were in violation of the constitutional rights of the defendant, as provided

by the Fourth Amendment of the Constitution; and that the introduction of such testimony is in violation of the constitutional rights of the defendant as provided under the Fifth Amendment to the Constitution.

"The COURT: It will be the same ruling and the same exception."

S. C. Dinsmore was called as a witness in behalf of the Government to testify to chemical analysis of the exhibits Nos. 1 and 2. Objection was made to the question. Transcript of Record upon Writ of Error, page 74:

"Q. What did your examination disclose as to the alcoholic contents of the same?

"Mr. MOORE: If the Court please, we object to the question on the grounds heretofore stated to the other question.

"The COURT: The same ruling and exception."

The Court orally instructed the jury, no exception was taken to such instructions. The jury retired, returned the verdict of guilty as charged. Before sentence was pronounced, Motion for New Trial was made. Transcript of Record Upon Writ of Error, page 38:

"Comes now the defendant named above and moves the Court that a new trial be granted for the following reasons, and on the following grounds, to-wit:

"1st. That the Court erred on its decision upon questions of law arising during the course of the trial.

"2d. That the verdict of the jury is contrary to law."

MOORE & McINTOSH
Attorneys for Defendant."

Which motion was denied and exception taken to such order, and the defendant sentenced to pay a fine of Five Hundred ($500.00) Dollars and costs. Transcript of Record upon Writ of Error, page 33:

"This being the time heretofore appointed for passing sentence in this case, Mr. Wm. Woodburn, U. S. Attorney, appeared on the part of the plaintiff; Mr. M. B. Moore, for defendant, who was also present. Mr. Moore presents his motion for a new trial, which was denied by the Court and an exception taken by counsel. Therefore the Court pronounced judgment as follows: ORDERED that the defendant pay to the United States a fine of Five Hundred Dollars and that he stand committed to the care of the marshal until the fine and costs incurred herein are paid."

Thereupon, the defendant caused to be filed a petition for Writ of Error, which appears in Transcript of Record on Writ of Error, page 49.

The Court, thereupon, made and entered an order allowing the Writ of Error. Transcript of Record on Writ of Error, page 50.

Citation on Writ of Error was issued and served. Transcript of Record upon Writ of Error,

pages 83 and 84.

Thereafter, Writ of Error was allowed. Transcript of Record upon Writ of Error, page 85.

Assignment of Errors filed; Transcript of Record on Writ of Error, page 39.

Bail bond on Writ of Error Filed; Transcript of Record on Writ of Error, page 52.

The same approved; Transcript of Record on Writ of Error, page 54.

Cost Bond on Writ of Error filed and approved; Transcript of Record on Writ of Error, pages 55 and 56.

The Assignment of Errors filed are eight in number, but in reality raise but two questions to be determined. Assignment of Errors Nos. I, II, III, IV, V, VI, and VIII, raise but one main question and that is, the legality and sufficiency of the affidavit of P. Nash upon which the search warrant was issued and including the legality of the search warrant itself.

Assignment No. VII, to-wit: That the Court erred in overruling defendant's motion made in said cause, in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside, and hold for naught the search warrant issued on the 28th day of December, raises

the question as to whether or not the District Court will review the proceedings had before the Commissioner.

II.

The questions raised by the Assignment of Errors Nos, I, II, III, IV, V, VI, and VIII are all based upon, and grow out of the proposition involved in the motion referred to under Assignment No. VIII, "That the said Court erred in overruling and denying defendant's motion made in this cause to quash the search-warrant issued by Anna M. Warren, a United States Commissioner in and for the District of Nevada, on the 28th day of December 1920, and for the return to the defendant of the property taken under said search-warrant."

The search-warrant mentioned in the foregoing Assignment of Errors was issued as the result of an affidavit filed before the Commissioner, Anna M. Warren, at the time the search-warrant was issued. The facts alleged in the affidavit are as follows; Transcript of Record upon Writ of Error, bottom of Page 4:

"That the facts, circumstances and conditions of which affiant has knowledge, and as ascertained by affiant are as follows, to-wit: Direct information by a certain citizen of Reno, whom affiant has known for several years and whom he considers

absolutely credible and reliable, but whose name cannot be stated on this affidavit; that on the 24th day of December, 1920, said informant and a friend purchased alcoholic liquors from the proprietor of said Alpine Winery, said liquor being served and sold from the back room (kitchen) of said soft drink establishment. Said information was given to affiant under oath."

It was urged in the Court below, and is now urged here, that the said statement of fact was insufficient and did not allege any fact from which the Commissioner could determine that probable cause existed for the issuance of the search-warrant.

The said statement is purely hearsay and states no fact within the knowledge of the person making the affidavit. Under no rule of evidence could the statement be admitted upon the trial of a person charged with any offense. The statement does not square with the Fourth Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Neither does the said statement conform to the requirements of the law providing for the issuance of search-warrants in such cases. See Act of June 5th, 1917, commonly called "Espionage Act", Sections 3, 4, and 5 thereof which provide in substance that no search-warrant shall be issued but upon probable cause supported by an affidavit naming or describing the person, and particularly describing the property and place to be searched—and that the magistrate must, before issuing the warrant, examine on oath the complainant and any witnesses he may produce—and the depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist. The same Act provides in Section 19 thereof that any person making a false affidavit for the purpose of securing the search-warrant shall be punished, as provided in Sections 125-126 of the Criminal Code of the United States. Sections 125-126 of the Criminal Code provide for the prosecution and punishment of anyone committing perjury; query, in the statement referred to could any person be successfully prosecuted for perjury for the making thereof.

The question as to the sufficiency of an affidavit from which the magistrate issuing the search-warrant may determine that probable cause exists for the issuance thereof, has often been before the Court and as often determined, and in no instance,

so far as the author of this Brief can find, has such a statement of facts as the foregoing ever been held sufficient. In Case No. 12,126, In Re: Rule of Court, Federal Cases decided in 1877 by the Circuit Court for the Northern District of Georgia, Bradley, Circuit Justice, in referring to cases similar to the case at bar, says:

> "I am informed by his Honor, the District Judge, that great inconvenience is caused in this district by the arrest of persons charged with offenses against the revenue laws, against whom no sufficient evidence can be produced, either before the grand jury to warrant an indictment, or before the traverse jury to justify a conviction, whereby much useless expense is caused to the government, and the personal liberty of the people is unnecessarily interfered with. One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. The District Judge, not being satisfied that this is a sufficient ground for issuing a warrant of arrest, has desired my advice in the matter. After examination of the subject, we have come to the conclusion that such an affidavit does not meet the requirements of the constitution, which, by the Fourth Article of the Amendments, declares that the right of the poeple to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and that no warrants shall issue but upon probable cause, supported by oath or affirmation, describing the place to be searched and the

persons to be seized. It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion on the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded. The magistrate can then judge for himself, whether sufficient and probable cause exists for issuing a warrant. It is possible that by exercising this degree of caution, some guilty persons may escape public prosecution, but it is better that some guilty ones should escape than that many innocent persons should be subjected to the expense and disgrace attendant upon being arrested upon a criminal charge, and this was undoubtedly the beneficent reason upon which the constitutional provision referred to was founded.

"In view of these considerations, and to correct the evil alluded to, we have prepared and now make the following general order for the guidance of the commissioners of this court, in the manner of issuing warrants of arrest against persons charged with crime, to-wit: No warrant shall be issued by any commissioner of this court for the seizure or arrest of any person charged with a crime or offense against the laws of the

United States upon mere belief, or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

That such a statement as that found in the affidavit in this case is insufficient, has been decided by numerous courts, and amounts to nothing more than a statement upon information and belief of the party making it—therefore, is insufficient. We cite, as directly bearing upon this question, the following:

U. S. v. Frieburg, 233d Fed. 313;
U. S. v. Veeder, 252d Fed. 414;
In Re: Tri-State Coal Co. 253d Fed. 605;
U. S. v. Weeks, 232 U. S. 383;
U. S. v. Baumert, 179th Fed. 735;
Beavers v. Hinkle, 194th U. S. 73; (48th L. Ed. 82);
U. S. v. Tureand, 20th Fed. 621;
Ex Parte Rhodes, 1st A. L. R. 568;
People v. Glennon, 74th N. Y. Supplement, 794;
State v. Gleason, 4th Pac. 363;
In Re: Kellam, 41st Pac. 960.

III.

Assignment of Error No. II:

"That the said Court erred in overruling defendant's objection to the introduction of testimony, made after the jury was impaneled and sworn to try said cause, and before any testimony as to

the facts was introduced at said trial;" which Assignment of Error was based upon the insufficiency of the search-warrant and of the affidavit.

Also, Assignment of Error No. III:

"To the admission of the testimony of the witness H. P. Brown, as to what he saw, found and did under the search-warrant;" which assignment was based upon the same ground

And Assignment of Error No. IV:

"The objection to the testimony of P. Nash as to what he saw, found and did under the said search-warrant;" also based upon the grounds of the insufficiency of the search-warrant and of the affidavit, can be determined under the same authorities as heretofore cited.

Assignment of Error No. V:

"That the Court erred in overruling the motion of defendant to strike the testimony from the record of Brown and Nash;" for the reason, as stated in the objection, that the testimony was secured by means of an invalid search-warrant, based upon an insufficient affidavit, should also be determined in the affirmative by this Court.

It will be observed from the record and references heretofore made in this Brief that the quesiton had been repeatedly raised before the

Court as to the admission of this testimony, and the reasons why it should not be admitted repeatedly urged and presented to the Court.

In the case of Gouled v. U. S., Supreme Court Advance Opinions, April 1st, 1921, page 311, published in the 65th L. Ed., the Court, in response to the sixth question propounded, to-wit:

> "If papers of evidential value only be seized under a search-warrant, and the party from whose house or office they are taken be indicted, —if he then move before trial for the return of said papers, and said motion is denied,—is the court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The Court says:

> "It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard-and-fast formula to every case, regardless of its special circumstances. We think, rather, that it is a rule to be used to secure the ends of justice under the circumstances presented by each case; and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and

decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

The law as enunciated in the Gouled case, is not limtied to the introduction of papers in evidence alone, but extends to the introduction of any matter in evidence, either by way of oral testimony or exhibits that were secured by the Government in an unconstitutional manner.

Weeks v. U. S. 232d U. S. 383; 58th L. Ed. 632;
Gouled v. U. S. supra.
Lawrence Amos v. U. S.-U. S. Supreme Court Advance Sheets, April 1st, 1921, page 316, also published in 65th L. Ed.
Holmes v. U. S. 275th Fed. 49;
Roy Youman v. Commonwealth of Kentucky, 13th A. L. R. page 1303; also found in the 224th Southwestern, page 860;
State of Wyoming v. Theo. Peterson, 13th A. L. R. page 1284.

IV.

The aforesaid Assignment of Errors, seven in number, are all primarily based upon the insufficiency of the affidavit filed before the Commissioner for the issuance of the search-warrant, in that the said affidavit did not contain any allegation of fact from the Commissioner could determine that probable cause existed for the issuance of said search-warrant.

In the case of Veeder v. U. S. Fed. 252, page 414, decided by the Circuit Court of Appeals for the Seventh Circuit, the Court says: (on page 418)

"A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the instinctive sense of natural justice, that no elaboration of the grounds therefor is needed.

"One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

"One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search-warrant.

"No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally

there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law.

"The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser."

Assignment No. V, based upon the motion to strike the testimony of Nash and Brown from the record, on the grounds that all of such testimony was secured under a search-warrant which was invalid; there is another question raised not directly covered in the foregoing citations. That question is, "Was the search-warrant itself a legal search-warrant?" Copy of the search-warrant in question will be found on page 25 and 26 of the Transcript of Record upon Writ of Error.

It is the contention of the plaintiff in error that the search-warrant is particularly deficient for two reasons:

First: That there is no finding of probable cause made by the Commissioner contained in the search-warrant. For this reason the search-warrant itself conferred no authority upon the officers to make the search. Before a commissioner or magistrate can legally issue a search-warrant it is

necessary that the magistrate judicially determine that probable cause exists for the issuance of the search-warrant, and such finding of probable cause is similar to the finding and statement of probable cause in a warrant of commitment, or other warrant; and in such warrants it is necessary that a finding of probable cause be made.

In Re: Van Campen, Fed. Case No. 16,835;
U. S. v. Brawner, 7th Fed. Rep. page 86;

Second: The search-warrant was invalid for the reason that no direction or instruction contained therein authorizing and directing the officer serving the same to either arrest the person in possession of the premises or of the property sought to be seized, and that there was no direction that the property be brought before the Commissioner.

White v. Wagner, 50th L. R. A., page 60, and other cases hereinbefore cited.

V.

Assignment of Errors No. VII:

"That the said Court erred in overruling defendant's motion made in said cause in which the defendant renewed the motion made before the Commissioner, Anna M. Warren, to quash, set aside and hold for naught the search-warrant issued by Anna M. Warren on the 28th day of December, A. D. 1920;" raises the question as to

whether or not the District Court has the right to review, or will review, any proceedings before the Commissioner; that the trial court has the power to review the acts of the Commissioner, we think, is determined by the following authorities:

Brawner v. U. S., 7th Fed. page 86;
Ex Parte Ballam, 8th U. S., pages 75, 114;
In Re: Martin, Fed. Cases, No. 9,151;
U. S. v. Shepherd, Fed. cases No. 16,273;
In Re: Buford, Fed. Cases, 2,148;
Foster's Fed. Practice, Vol. 2, Sec. 488, page 1623.

VI.

In view of the questions raised herein upon the Writ of Error and upon the authorities herein cited, the plaintiff in error should prevail and the cause be remanded to the District Court with directions to quash the search-warrant and to exclude and suppress all testimony secured thereby, and the action be dismissed.

Respectfully submitted,
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